

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	Supreme Court No. 999597
	)	
Respondent,	)	
v.	)	PETITIONER'S
	)	AMENDED OBJECTION
JOSEPH ZAMORA,	)	TO STATE'S MOTION TO DISMISS
	)	
Petitioner.	)	

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1. Identity of Responding and Moving Party.

Petitioner Joseph Zamora is the responding party to the State's RAP 7.2 motion to "accept dismissal and dismiss appeal" filed 12/1/2021 and asks for the relief designated in Part 2 of this motion.

2. Statement of Relief Sought.

Denial of the State's RAP 7.2 motion to dismiss Mr. Zamora's appeal.

3. Facts And Argument Relevant to Motion.

Mr. Zamora was convicted of two counts of assault in the third degree. The matter proceeded on appeal and the Court of Appeals affirmed his convictions on June 8, 2021.

On November 3, 2021 this Court accepted review on two issues:  
prosecutorial misconduct and a violation of the right to confront and cross examine

his accusers. Supplemental briefing is scheduled for filing by December 3, 2021 and oral argument is set for February 22, 2022.

On December 1, 2021, the State filed a RAP 7.2 motion with this Court to allow the trial court to dismiss Mr. Zamora's appeal as moot because he had already served his sentence and the prosecutor's office was too busy to manage Mr. Zamora's case before this Court.

The State attached a signed order from the trial court "dismissing" Mr. Zamora's case. The order included the signature of Mr. Zamora's previous trial counsel who is not the attorney of record. Appellate counsel, the counsel of record for Mr. Zamora, was not notified of the State's motion at the trial court until it was filed in this Court.

Basic due process and the governing criminal rules require notice of court proceedings to counsel of record. *State v. Pruitt*, 145 Wn.App. 784, 792, 187 P.3d 326 (2008). Service upon a party's former lawyer does not excuse the failure to notify appellate counsel, the only counsel of record at the time. *Id.* at 793. This Court should disregard the "dismissal" which was obtained without proper notice to counsel. *State v. Nava*, 177 Wn.App. 272, 289 n.6, 311 P.3d 83 (2013). Even where trial counsel remains counsel of record notice should be given to appellate counsel. *State v. I.N.A.*, 9 Wn.App.2d 422, 426, 446 P.3d 175 (2019).

It is patently unclear what the State asked the trial court to “dismiss.” The attached signed trial court order to “dismiss the case with prejudice” is meaningless. The convictions have already been entered and are currently affirmed by the Court of Appeals.

The trial court does not have authority to dismiss an appeal. RAP 18.2 authorizes the Appellate Court, on motion, to dismiss review of a case on stipulation of all parties, and in criminal cases, the written consent of the defendant. Mr. Zamora did not sign a written consent agreeing to dismissal of his appeal. There is no evidence he, like appellate counsel, ever received notice of the State’s motion to “dismiss” in the trial court.

RAP 7.2 authorizes the trial court to hear and determine post judgment motions. However, where the trial court actions will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained *prior to* the formal entry of the trial court decision. A party should seek the required permission by motion.

In July and August 2021, the State followed the correct procedure of RAP 7.2 when it sought to modify Mr. Zamora’s offender score based on *State v. Blake*. The State provides no explanation for why it did not provide the required notice to counsel for this motion, nor did it seek this Court’s permission before obtaining a signed order from the trial court dismissing a case that is on review.

If the State is seeking to preclude review of the issues granted by this Court by conceding error, then it must concede error. A motion of “dismissal” at the trial court is not the appropriate vehicle for conceding error.

If the State is arguing that Mr. Zamora’s case is moot because he has already served his time, the argument fails. Mr. Zamora’s record will show two convictions for assault in the third degree, and the legal consequences of those convictions remain for him, including legal financial obligations, loss of the right to vote, and to possession of a firearm.

Simply put, there is nothing for the trial court to dismiss. And without concession of error, there is no basis on which to vacate the convictions.

This Court should review the case on its merits. Even if the Court were to consider the case moot because Mr. Zamora served his time of incarceration, the issues bear scrutiny. When considering mootness, this Court analyzes three factors: (1) whether the issue is of a public or private nature; (2) whether an authoritative determination is desirable to provide future guidance of public officers, and (3) whether the issue is likely to recur. *In re Marriage of Horner*, 151 Wn.2d 884, 891-92, 93 P.3d 124 (2004). Applying the factors to the issue presented here, the question of whether it is prosecutorial misconduct to inject racial stereotypes into voir dire is a significant question of public interest. This Court has made great strides in racial justice and acknowledged the need for continued effort to eradicate

the evil of racial bias. The Court of Appeals ruling in this case stands in stark contrast to an unpublished ruling in *State v. Ellis*, 2021 WL 3910557 (August 31, 2021) on the same issue of the use of racist stereotypes in voir dire. Because the Courts of Appeal differ in their treatment of the issue guidance from this Court is imperative to ensure that each division of the Court of Appeals reviews the critical stage of voir dire with the same analysis. Finally, this issue is likely to recur. Without guidance from this Court, these and other counties may be inured to the harmful effects of a prosecutor's extensive discussion about the dangers to society from immigrants who enter illegally at the border. Mr Zamora is a U.S. citizen with a Latino surname and the prosecutor's comments prejudicially highlighted his ethnic background.

Similarly, this Court has never ruled on the issue of Garrity statements and limitations on cross examination of officers who are investigated for police misconduct. In the changing culture of law enforcement in society, and recent legislation around policing, this Court's guidance is necessary.

## 5. Conclusion

Mr. Zamora respectfully urges this Court to deny the State's RAP 7.2 motion to dismiss his appeal. The State failed to provide due process through notice to counsel. Mr. Zamora has not agreed to dismissal. The State's motion does not fit into the established appellate framework: dismissal of the appeal does not happen

at the trial court. And finally, Mr. Zamora's appeal should not be dismissed in this Court on the basis that the prosecutor's office is too busy to make an argument before this Court.

Appellate counsel has already filed an affidavit by the previous trial counsel explaining why he erroneously signed the "dismissal" order.

Per RAP 18.17 this document contains 1149 words.

Respectfully submitted on December 2, 2021.

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#### PROOF OF SERVICE

(RAP 18.5(b))

I, Marie J. Trombley , do hereby certify under penalty of perjury that on December 2, 2021, I provided e-mail service by prior agreement a true and correct copy of the Petitioner's Amended Answer/Objection to State's Motion to Dismiss to:  
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**MARIE TROMBLEY**

**December 02, 2021 - 3:08 PM**

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AMENDED OBJECTION

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